No. 08-939

In The

Supreme Court of The United States

BERNARD MACKAY,

Petitioner,

v.

AIRCRAFT MECHANICS FRATERNAL ASSOCIATION and AIRCRAFT MECHANICS FRATERNAL ASSOCIATION LOCAL 14,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

As the Ninth Circuit stated, "[t]his *Hudson*[1] case turns on whether Bernard J. Mackay was a member of the Union." (App. 2a). According to the Ninth Circuit, the finding that Mackay was a member is a "finding of fact." (App. 8a).

The trial court found that Mackay was a voluntary and consenting member of the Union when he was terminated for non-payment of Union dues, and the Ninth Circuit affirmed. Mackay now seeks review of the factual finding that Mackay knowingly and voluntarily accepted the Union's offer of membership.

The question presented is:

Should this Court grant review to consider whether the Ninth Circuit erred in affirming the trial court's factual finding that Bernard Mackay was a voluntary and consenting member of the Union based on his acceptance of the Union's offer of membership?

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[1] *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

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STATEMENT OF THE CASE

A. Introduction

After Petitioner's termination for non-payment of Union dues, he brought this action claiming the protections provided by *Hudson*. However, at every stage of this lengthy litigation, Petitioner has been found to have been a voluntary and consenting member of the Union based on actions that he took, and did not take, in his relationship with the Union. "As a member of the union, plaintiff was not entitled to the procedural safeguards and detailed, audited financial disclosures mandated by *Hudson*, *Ellis*...and *Dean*." (App. 40a).

Petitioner seeks review on the grounds that the Ninth Circuit's decision implicates important legal principles concerning the right of employees voluntarily to choose or reject union membership. However, that is not the issue here. This case does not undermine or affect an employee's right to choose or reject union membership, and neither the Ninth Circuit nor the Respondents dispute that such a right exists.

At issue here is whether the evidence supports the factual finding that "Mackay thereby accepted the Union's offer of membership." (App. 3a). Respondents submit that there is no basis for this Court to review this finding of fact.

B. Statement of Facts[1]

On April 1, 1998, the Aircraft Mechanics Fraternal Association ("AMFA") was certified by the National Mediation Board ("NMB") as the exclusive representative of the craft or class of Mechanics and Related Employees of Alaska Airlines ("Alaska"), replacing the International Association of Machinists ("IAM"). Upon its certification, AMFA inherited the existing Alaska-IAM collective bargaining agreement, which did not contain a union security clause requiring the payment of union dues or agency fees as a condition of employment.

Following the NMB's certification of AMFA, AMFA's highest governing body, its National Executive Council ("NEC"), made, and then implemented, a decision, confined to Alaska mechanics, to waive the formal or constitutional prerequisites for becoming a union member. (SER 179, line 3; 181, line 12; 182, line 5).

The waiver was not unique to any one individual or group, but rather the waiver was universal to all mechanics in the Alaska bargaining unit represented by AMFA. (SER 181, lines 11-12). In

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[1] In this brief, references to the record in the Ninth Circuit are as follows: "ER" refers to Petitioner-Appellant's Excerpts of Record; "SER" refers to Respondents-Appellees' Supplemental Excerpts of Record; "Dkt" refers to docket entries in the District Court; and "Tr. Ex." refers to trial exhibits.

this manner, no mechanic was burdened with the constitutional formalities of filling out an application, being investigated, taking an oath, or obtaining a vote of approval, nor was any mechanic burdened with the added financial requirement of paying an initiation fee. (SER 36, line 7; 185, lines 9-24).

Initially under the waiver (i.e., before a union security clause was negotiated into a new contract), no requirements for membership were imposed at all, and even paying dues was strictly voluntary. (SER 181, line 19). Later, if and when a union security provision was obtained in a new contract, then payment would suffice for membership: "there were informational notices put out that you could become a member by signing a dues check-off or paying the union directly." (SER 94, line 23).

The purpose of the waiver was to make the union democratic processes, such as ratification elections for the upcoming new contract, or election for officers, as accessible as possible to all mechanics in the bargaining unit, regardless of whether those mechanics had supported or opposed AMFA in the campaign to replace the prior union. (Tr. Ex. 8; ER 374). This was important at the time because, unlike Mackay, who had evidenced some support for AMFA,[2]

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[2] Mackay, too, participated in the campaign to get AMFA on the property by completing a representation card and handing it to Kevin Jurasinski (SER 110, line 21), who was then a fellow mechanic and who later became President of Local 14 and who later still credibly testified (ER 3, line 6) at the trial about his many exchanges with Mackay.

some mechanics had not and consequently were on the "losing" side, yet AMFA now faced the need to rally the bargaining unit for upcoming contract negotiations and an eventual contract ratification election.[3]

Consistent with this waiver, on April 8, 1998, AMFA's National Director, O.V. Delle-Femine, published a memorandum addressed to all Alaska-employed mechanics that stated, *inter alia*: "In AMFA everyone is a member in good standing and they can vote on the contract, the by-laws and local officers." (ER 375). Delle-Femine's memorandum was posted on the union bulletin board at work sites accessible to all Alaska mechanics at the time. (SER 9, lines 14-22; 114, lines 1- 15).

Soon after becoming the bargaining agent for the mechanics at Alaska, AMFA entered into contract negotiations with the company, and eventually a tentative agreement was negotiated. (ER 66, admission 11). Following this, in June of 1999, a ratification election over whether to accept the tentative agreement was held, and as a result, the contract was ratified.[4] (SER 108, line 24).

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[3] There is no evidence in the record to support Petitioner's allegation that the purpose of the waiver was "to collect dues as quickly as possible." (Petition at 7).

[4] With Mackay's help, too, when he obtained an absentee ballot. (ER 118, line 9); (Trial Ex. 10).

The new Alaska-AMFA contract included a "union security clause" found in Article 31. (ER 67, admission 12; Tr. Ex. 6; ER 369). By virtue of the new contract, the mechanics' bargaining unit at Alaska became an "agency shop," meaning that as a condition of maintaining employment at Alaska, all mechanics were required to pay to the union either membership dues or, in the alternative, agency fees in the case of non-members.[5] (ER 369: "Article 31: Union Shop"). Pursuant to Article 31, the Union was required to notify an employee who was delinquent in the payment of dues or fees before the employee could be discharged. (ER 369, line 26).

Under the earlier waiver of the Union's constitutional prerequisites for membership, no mechanic was forcibly enrolled as a member in the union (SER 86, line 7; 133, line 7; 183, line 21); rather, the waiver was extended as an *offer* of membership that could be accepted by payment of dues: "Waiving of the membership requirement was an *offer* to be a member." (SER 182, line 5). The only step required to accept membership was payment of dues. (SER 185, line 25). Thus, AMFA provided a fundamental choice of either membership by dues payment, or non-membership by payment of agency fee. (SER 183, line 18).

Mackay was personally notified of his choice to be either a member or a non-member. In 1999, Steve

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[5] Such provisions are lawful under the Railway Labor Act, 45 U.S.C. § 152, Eleventh

Lovas, a Union officer who worked alongside Mackay, personally brought Mackay a copy of the proposed new AMFA-Alaska contract, and advised him that it included a proposed union security clause. (SER 96, line 6).

After the tentative agreement was ratified in an election, Lovas personally brought Mackay a copy of AMFA's "Policies and Procedures Applicable to Nonmember Fee Payers" (the "Nonmember Policy") and personally discussed it with him. (SER 97, line 22). Under the Nonmember Policy, a mechanic could assert his right to be a non-member of the Union, and consequently qualify to pay agency fees instead of membership dues in order to maintain his employment. (Tr. Ex. 12; ER 381; Tr. Ex. 13; ER 384; SER 119, line 19). Lovas specifically called to Mackay's attention that there was now a union security clause in the contract so as to make sure that Mackay knew that he could choose to be a union member with the obligation to pay dues, or that he could choose not to be a member, but then with an obligation to pay an agency fee. (SER 99, line 3).

Lovas specifically advised Mackay that if he did not want to be a member and/or objected to paying membership dues, then he had to notify the Union of that fact. (ER 183, line 12).

Mackay, however, never told Lovas, or otherwise notified him, that he objected to membership. (SER 23, line 3).

A copy of the AMFA-Alaska contract, which included the union security provision in Article 31, was

given to Mackay in August of 1999, and he signed a receipt for it. (Tr. Ex. 87; SER 7, line 11). AMFA Local 14 President Kevin Jurasinski personally informed and advised Mackay of the meaning of Article 31, as well as the consequences of violating it. (SER 5, line 14).

In October 1999, when Jurasinski learned that Mackay was not paying either union dues or non-member agency fees, Jurasinski met with Mackay and specifically warned him that his job was in jeopardy, because he was in arrears in the payment of either union membership dues or non-member fees. (SER 116, line 15). Mackay responded that "he didn't have a problem paying dues" (SER 116, line 20), and did *not* assert himself to be a non-member. (SER 117, line 10-13). Jurasinski advised Mackay that he was not required to be a union member but instead told him that he had the choice of being a non-member. (SER 116, line 17).

Mackay, however, paid neither dues nor fees at any time in 1999 (SER 120, line 2) notwithstanding the warning he had received from Jurasinski in October 1999. (SER 120, line 7).

As a result, on December 2, 1999, AMFA mailed to Mackay a certified letter informing him that he was delinquent in the payment of union membership dues, and that pursuant to the contract's union security provision, his name would be submitted to Alaska for termination if he did not make payment within fifteen days. (App. 44a-45a). Nevertheless, Mackay did not make any payment, whether of dues or of fees, by the

deadline. (ER 125, line 5; SER 121, line 1-15).

On January 6, 2000, Jurasinski sought out Mackay at work to tell him that, because Mackay remained in arrears, the Union would have to submit his name to the company for termination. (SER 121-122). Mackay at that time handed Jurasinski a check made out to "AMFA" in the amount of $90, and, on the check Mackay wrote, in the "For" line, "Nov./Dec." (ER 219, line 9; Tr. Ex. 19; ER 390; SER 122, line 21). Jurasinski understood that the check was payment of membership dues. (ER 219, line 20; SER 117, line 2).

After receiving dues payment from Mackay on January 6, 2000, Jurasinski considered Mackay a union member. (SER 123, line 22). But Mackay again went into arrears. (SER 123, line 25). Between the dues payment he made on January 6, 2000, and his termination on July 11, 2000, Mackay never made payment of any kind again. (SER 124, line 7).

In this same period, Mackay did not give any notice to the Union of objection to paying union membership dues or in any way attempt to establish dues objector status. (SER 58, line 5).

On May 17, 2000, AMFA sent yet another notice of delinquency to Mackay, which warned that if he did not pay by June 1, 2000, the Union would submit his name to Alaska for termination. (SER 124, line 21; SER 194; Tr. Ex. 21). After receiving the May 17 notice, Mackay raised no objection to paying dues, or asserted any claim to pay non-member fees. (SER 35, line 15; 63, lines 8-19).

On June 16, 2000, the Union notified Alaska that Mackay had failed to pay union membership dues and should be discharged pursuant to the union security provision. (Tr. Ex. 24; ER 401); (SER 191, line 3). Mackay was terminated on July 11, 2000. (Tr. Ex. 27; ER 403).

Following his discharge, Mackay exercised his right under the contract to file a grievance to contest his discharge. (ER 134, line 6); (Tr. Ex. 89; SER 196). Mackay's grievance made no claim that he was a non-member entitled to the protections of *Hudson*. Similarly, at a grievance hearing, Mackay made no claim he was not a member when discharged, or that he objected to paying dues, or that he wanted to pay fees instead of dues. (SER 150, lines 10-14; 151, line 23).

After Alaska denied Mackay's grievance, he filed an appeal to the System Board of Adjustment demanding an arbitration hearing. (ER 137, line 18); (SER 74, line 21; 154, line 17). The Appeal's recitation of facts expressly asserted that Mackay was willing to pay "delinquent ... dues," contained no objection to paying dues, and did not assert that Mackay was not a member of the union. (SER 199, ¶ 2).

However, before Mackay's grievance was heard in an arbitration hearing, or even scheduled, on January 6, 2001, Mackay unilaterally withdrew his grievance.

Mackay first unequivocally claimed that he was not a member of the union at the time he was

discharged, when he filed his lawsuit in early January 2001. (ER 38, line 22); (SER 69, lines 5-10). The District Court found that Mackay's late claim to non-membership was a "litigation strategy" that could not "change the nature of plaintiff's conduct between June 1999 and July 2000 or otherwise forestall the conclusion that plaintiff was a member of AMFA and Local 14." (App. 40a).

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit's Decision is Not Inconsistent with the Precedents of this Court or Other Circuit Courts.

Contrary to the Petitioner's argument, the decision of the Ninth Circuit does not conflict with relevant decisions of this Court or other United States courts of appeals. The Ninth Circuit affirmed the district court's factual finding that Mackay was a voluntary and consenting member of the Union.[6]

Petitioner points out that as a matter of law, membership in a union is voluntary and therefore no employee can be compelled to be a member. (Petition at 10-11). But that principle is not an issue in this case because AMFA has never claimed otherwise and the Ninth Circuit did not so hold, nor can Petitioner point to any communication from AMFA prior to his

[6] Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings..."

discharge, or during his grievance, that asserts a right to compel Petitioner's membership. Thus, the point is purely rhetorical and provides no basis for review. Rather, this case is about accountability for a choice made.

Yet Petitioner goes on to claim that "an employee's 'default position' is nonmembership in the union unless and until he affirmatively chooses to change that status." (Petition at 13). According to Petitioner, a contrary result would leave every type of association "free to conscript anyone it chooses into membership." (Petition at 13). However, such a conscription risk is not implicated in this case.

This case required the District Court and the Ninth Circuit to look at whether the actions and the inactions that they found Petitioner affirmatively undertook - and which are not disputed - constituted voluntary membership under the facts. There is no quarrel with the point that free association means that individuals may freely associate or not, nor did the Ninth Circuit hold otherwise. What the Ninth Circuit *did* hold was that the following affirmative actions and inactions, intentionally and knowingly taken or not taken, are those that directly support the conclusion that Petitioner voluntarily became a union member prior to his discharge:

> Mackay was twice told that he could be either a Union member who paid dues, or a nonmember who paid agency fees. He was told that under the union security clause in the collective bargaining agreement, he could lose

> his job if he did not pay one or the other. Mackay was also twice given the Nonmember Fee Policy, which explained, among other things, the difference between Union expenses germane to collective bargaining – which all employees cover – and non-germane expenses – which only members are obliged to cover. The Policy also indicated that employees were required to pay either dues or fees to keep their job. Mackay did not pay anything until January 2000, when he wrote a check for past dues owed after being warned that his name would be submitted for termination. At no time did he tell Union officials that he did not want to pay dues or be a member.[7]

(App. 2a-3a). Based on the above facts, the Ninth Circuit found that the district court "could conclude that Mackay thereby accepted the Union's offer of membership." (App. 3a).

The cases cited by the Petitioner are distinguishable and, therefore, not in conflict with the Ninth Circuit's decision in this case. *United Nuclear Corp. v. NLRB*, 340 F.2d 133 (1st Cir. 1965) is

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[7] Petitioner points to trial testimony in which Mackay testified that he told Local 14 President Jurasinski that he would not join. (Petition at 9). However, the trial court found that in October 1999 when Mr. Jurasinski told Mackay that he had to either pay union dues or a nonmember agency fee, Mackay "did not state that he did not want to be a union member." (App. 13a). The trial court found that "Mr. Jurasinski was a highly credible witness." *Id.* In any event, at most Petitioner alleges a factual error not appropriate for review in this Court.

distinguishable because in that case, unlike here, there was no waiver of the constitutional requirements for becoming a union member, which, in AMFA's case, applied to all mechanics in the Alaska bargaining unit. (SER 181, lines 11-12). Further, there was no evidence in *United Nuclear* that the employees were advised of their choice to be either members or nonmembers, as the Ninth Circuit found in Mackay's case. For the same reason, *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992), is distinguishable. In that case, the SUNY Albany students did not have a choice whether or not to become members of NYPIRG – the court found that their membership had been compelled. That was not so with respect to Mackay. According to the Ninth Circuit, "Mackay was twice told that he could be either a Union member who paid dues, or a nonmember who paid agency fees." (App. 2a). Petitioner's cases on compelled membership do not conflict with the ruling in this case.

Petitioner concedes that "this Court's labor law jurisprudence is based on the principle that union membership is a voluntary contractual arrangement requiring an agreement to be bound and mutuality of promises." (Petition at 12). *NLRB v. Boeing Co.*, 412 U.S. 67, 75-76 (1973) ("The relationship between a member and his union is generally viewed as contractual in nature, and the local law of contracts or voluntary associations usually governs the enforcement of this relationship") (citations omitted).

In this case, the Ninth Circuit applied the local law of contracts to the relationship between AMFA

and Mackay. (App. 3a). *Hoglund v. Meeks*, 170 P.3d 37, 46 (Wash. Ct. App. 2007) ("A contract may be oral as well as written, and a contract may be 'implied in fact with its existence depending on some act or conduct of the party sought to be charged'") (citation omitted); *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 115 P.3d 262, 267 (Wash. 2005) (under the objective manifestation theory of contracts, which Washington follows, the court attempts "to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties") (citation omitted); *Plumbing Shop, Inc. v. Pitts*, 408 P.2d 382, 384 (Wash. 1965) (Washington courts "impute to a person an intention corresponding to the reasonable meaning of his words and acts. Unexpressed intentions are nugatory when the problem is to ascertain the legal relations, if any, between two parties") (citation omitted).

Here, the record shows beyond dispute that Mackay objectively manifested both payment of dues, albeit a single time, and a repeated willingness to pay dues and that he did so without qualification · and that payment of dues was the manner of acceptance the Union sought for its offer of membership throughout the mechanics' bargaining unit at Alaska. That Mackay indicated an unwillingness to participate in union activities or to get mail (Petition at 8) is not the same as not agreeing to join because participation or getting mail were never membership requirements, nor was that ever claimed.

The Ninth Circuit held that Mackay accepted AMFA's offer of membership. (App. 3a). It did not hold that Mackay was "conscripted" into union membership without his knowledge or consent. Accordingly, this decision is not in conflict with the decisions of this Court or other Circuits that recognize the principle of voluntary unionism.

B. The Ninth Circuit's Decision Does Not Undermine the Principle of Voluntary Unionism or the Ruling in *Hudson*.

Petitioner's argument that the Ninth Circuit's decision "undermines the fundamental federal labor principles of 'voluntary unionism,'" as reflected in *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), is without merit.

In *Pattern Makers*, this Court decided the issue of "whether a union is precluded from fining employees who have attempted to resign when resignations are prohibited by the union's constitution." *Id.* at 101. The constitution at issue provided that resignations were not permitted during a strike or when a strike is imminent. *Id.* at 96-97. This provision was held invalid because union restrictions on the right to resign are "inconsistent with the policy of voluntary unionism implicit in [NLRA] § 8(a)(3)." *Id.* at 104.

This case, however, does not involve any restrictions on the right to resign. To the contrary, the Ninth Circuit found that "Mackay was twice told that he could be either a Union member who paid dues, or a

nonmember who paid agency fees." (App. 2a). Unlike the union members in *Pattern Makers*, who were constitutionally barred from resigning, Mackay was clearly informed of his right to be a non-member.

Nor does the Ninth Circuit's decision undermine, or in any way conflict with, this Court's ruling in *Hudson*, as argued by the Petitioner. (Petition at 18). *Hudson* plainly concerns only nonmember rights and the constitutional requirements for a union's collection of agency fees (not membership dues), despite the Petitioner's attempt to argue that this Court has not limited *Hudson*'s protections only to nonmembers. *Id.* As stated by this Court, *Hudson* concerned "the constitutionality of the procedure adopted by the Chicago Teachers Union ... to respond to nonmembers' objections...." *Hudson*, 475 U.S. at 294. Thus, upon finding Mackay a member, no *Hudson* issue existed for the Ninth Circuit.

CONCLUSION

In this case, the Petitioner was offered the choice of being a member or a nonmember, and, by his conduct, he accepted the Union's offer to be a voluntary and consenting member. Because this factual finding does not undermine the policy of voluntary unionism, or conflict with the decisions of this Court or other Circuit courts, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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